

The Unconstitutional Burden of Article 15: A Rebuttal

Edward J. Imwinkelried* and Francis A. Gilligan**

A recent Note in this Journal argued that the military's nonjudicial punishment procedures infringe essential rights of service members.¹ The argument was largely based on *United States v. Jackson*,² a 1968 Supreme Court decision which declared unconstitutional a federal statutory provision that encouraged waivers of Fifth and Sixth Amendment rights. In arguing from *Jackson*, however, the Note committed analytic errors serious enough to invalidate its contention that the Article 15 procedure is unconstitutional.

I. Article 15

Article 15 of the Uniform Code of Military Justice (UCMJ) provides that a commander may use informal, summary procedures to impose punishments upon members of his command for minor offenses.³ The punishments are relatively light⁴ and the imposition of an Article 15 punishment upon a serviceman does not constitute a federal conviction.⁵ As the Manual for Courts-Martial emphasizes, Article 15 punishments are not merely punitive; rather, "[p]unishments under Article 15 are primarily corrective in nature."⁶ Article 15 proceedings are both a disciplinary mechanism and an instrument for pretrial diversion. If the serviceman has violated the Uniform Code but his commander feels that the offense is too minor

* Captain, JAGC, U.S. Army; Instructor, Criminal Law Division, The Judge Advocate General's School. Member of the Bar, California.

** Major, JAGC, U.S. Army; Instructor, Criminal Law Division, The Judge Advocate General's School. Member of the Bar, New York.

The opinions and conclusions presented herein are those of the authors and do not necessarily represent the views of The Judge Advocate General's School or any other governmental agency.

1. See Note, *The Unconstitutional Burden of Article 15*, 82 YALE L.J. 1481 (1973) [hereinafter cited as Yale Note]. For another discussion questioning the constitutionality of the procedures, see Carnahan, *Comment—Article 15 Punishments*, 13 A.F. JAG L. REV. 270, 273-74 (1971).

2. 390 U.S. 570 (1968).

3. 10 U.S.C. § 815 (1970).

4. 10 U.S.C. § 815(b) (1970); MANUAL FOR COURTS-MARTIAL, UNITED STATES, ¶ 131 (rev. ed. 1969) [hereinafter cited as MCM]; Army Regulation Number (Army Reg. No.) 27-10, ¶¶ 3-7, 3-8 (Nov. 26, 1968).

5. *United States v. Johnson*, 19 U.S.C.M.A. 464, 42 C.M.R. 66 (1970); *United States v. Green*, 20 C.M.R. 606 (AFBR 1955).

6. MCM ¶ 129b.

The Unconstitutional Burden of Article 15: A Rebuttal

to justify blemishing the serviceman's record with a federal conviction, the commander can divert the case from the judicial process.⁷ The controversial feature of Article 15 procedures is the provision that the serviceman may demand court-martial in lieu of a nonjudicial punishment proceeding.⁸ When a serviceman makes such a demand, he runs the risk that his commander will prefer court-martial charges against him,⁹ which might result in more severe punishment by a special court-martial¹⁰ and in a federal conviction.¹¹ In effect, the serviceman must waive the procedural safeguards of a judicial, court-martial trial before the commander may resort to nonjudicial punishment procedures. The Note suggests that this feature of Article 15 procedures is unconstitutional under *Jackson* because it unnecessarily encourages servicemen to waive their rights to a judicial trial.¹²

II. The *Jackson* Analysis

A. United States v. Jackson

In 1966, a federal grand jury indicted Charles Jackson for a violation of the Federal Kidnapping Act.¹³ The indictment alleged that Jackson had kidnapped a person for ransom, transported the hostage across state lines, and released the person harmed. The Federal Kidnapping Act's penalty clause provided that only a jury could impose the death penalty. In the district court Jackson moved to dismiss the indictment on the ground that the Act unconstitutionally impaired the exercise of his rights under the Sixth Amendment because it forced him to risk imposition of the death penalty as the price for asserting his right under that Amendment to a jury trial.¹⁴ The trial judge granted the motion and the Government appealed directly to the Supreme Court.¹⁵ In an opinion authored by Justice Stewart the Court held that the Act unconstitutionally discouraged the exercise of both "the Fifth Amendment right not to plead guilty and . . . the Sixth Amendment right to demand a jury trial."¹⁶ Jus-

7. *Id.*

8. 10 U.S.C. § 815(a) (1970).

9. Army Reg. No. 27-10, ¶ 3-12b (Nov. 26, 1968).

10. Compare 10 U.S.C. § 815(b), with 10 U.S.C. §§ 818-20 (1970).

11. The court-martial is a federal court and its guilty finding constitutes a federal conviction. See generally *United States v. Montgomery*, 20 U.S.C.M.A. 35, 42 C.M.R. 227 (1970).

12. See Yale Note, *supra* note 1, at 1482.

13. 18 U.S.C. § 1201(a) (1948).

14. *United States v. Jackson*, 390 U.S. 570, 571 (1968).

15. *Id.* at 571-72.

16. *Id.* at 581.

tice Stewart articulated a general rule that a procedure is unconstitutional if it "unnecessarily and needlessly" encourages the waiver of a constitutional right.¹⁷

Applying the rule to the facts of the case before the Court, Justice Stewart concluded that the Act's penalty clause encouraged a waiver of the defendant's Fifth and Sixth Amendment rights. The price for asserting those rights was the grave risk that the jury would sentence the defendant to death:

Under the Federal Kidnapping Act, therefore, the defendant who abandons the right to contest his guilt before a jury is assured that he cannot be executed; the defendant ingenuous enough to seek a jury acquittal stands forewarned that, if the jury finds him guilty and does not wish to spare his life, he will die.¹⁸

The question remained whether the procedure was unnecessary and needless. Mr. Justice Stewart conceded that *Jackson* was not a case in which "the provision had no other purpose or effect than to chill the assertion of constitutional rights by penalizing those who choose to exercise them."¹⁹ If *Jackson* had been such a case, the Court could have decided the case easily; the procedure would have been "patently unconstitutional."²⁰ However, the Government had correctly pointed out that the procedure served the purpose of mitigating the death penalty.²¹ The Government contended that the procedure's inhibitory effect on the defendant's exercise of his Fifth and Sixth Amendment rights was merely incidental to the pursuit of a legitimate policy.²² Justice Stewart rejoined that the Government misconstrued the issue: "The question is not whether the chilling effect is 'incidental' rather than intentional; the question is whether the effect is unnecessary and therefore excessive."²³ He conceded that the goal of limiting the death penalty was legitimate but added that "[t]hat goal can be achieved without penalizing those defendants who plead not guilty and demand jury trial."²⁴ There were other methods for implementing the policy of limiting the death penalty and some of them did not encourage any waiver of Fifth or Sixth

17. *Id.* at 582-83.

18. *Id.* at 581.

19. *Id.*

20. *Id.*

21. *Id.* at 581-82.

22. *Id.* at 582.

23. *Id.*

24. *Id.* at 582.

The Unconstitutional Burden of Article 15: A Rebuttal

Amendment rights.²⁵ There was thus no necessity for adopting a procedure which involved such a waiver. The Government could have pursued its legitimate policy objective without encouraging a waiver of constitutional rights.

B. *Jackson and the Article 15 Waiver Procedure*

The Note attempted to construct an argument that Article 15 unnecessarily encourages a waiver of Fifth and Sixth Amendment rights. First, it attempts to equate the serviceman's election of an Article 15 proceeding to a waiver of those rights. It argues that the election is equivalent to a guilty plea.²⁶ It contends further that the waiver of a special court is analogous to a waiver of Sixth Amendment rights because the special court panel is the "functional equivalent" of the civilian jury.²⁷ Noting the disparity between the punitive powers of the Article 15 authority and the special court, it argues that the serviceman is encouraged to waive the special court.²⁸

Next, the Note contends that the waiver procedure is unnecessary. It asserts that none of the asserted justifications for the procedure—judicial economy, protecting the accused from the deleterious consequences of a federal conviction, and the Government's interest in an expeditious proceeding for handling minor offenses—is substantial enough to justify the waiver.

The Note concludes that *Jackson* mandates a holding that the Article 15 waiver procedure violates servicemen's Fifth and Sixth Amendment rights. The reasoning leading to the conclusion, however, is faulty in several respects.

1. *Waiver of the Fifth Amendment Right Not to Plead Guilty*

The Article 15 waiver procedure is invalid if it unnecessarily encourages a waiver of the Fifth Amendment right not to plead guilty. The pivotal issues are whether the serviceman's election of an Article 15 proceeding amounts to a guilty plea and, if it does, whether the right not to plead guilty is thereby unconstitutionally burdened. It

25. *Id.* at 582-83. The Court stated that

[I]n some States, for example, the choice between life imprisonment and capital punishment is left to a jury in every case—regardless of how the defendant's guilt has been determined. Given the availability of this and other alternatives, it is clear that the selection of the death penalty provision . . . cannot be justified by its ostensible purpose.

Id.

26. Yale Note, *supra* note 1, at 1486.

27. *Id.* at 1487.

28. *Id.* at 1482.

seems clear that the election is not equivalent to a guilty plea. The Note concedes that, formally at least, the election is "neither an admission of guilt nor a trigger for automatic punishment" ²⁹ The Manual for Courts-Martial points out that, even if the serviceman elects an Article 15 proceeding, he may submit matters in defense.³⁰ Army Regulation 27-10 states that "[t]he right and opportunity to present matters in . . . defense . . . will be stressed [in the Article 15 proceeding]."³¹ The new *Suggested Guide for Conduct of Nonjudicial Punishment Procedures*, which commanders will soon use to conduct Article 15 proceedings, stresses that the commander should assure the serviceman that,

If you decide to consent to these proceedings, I will not interpret your consent as an admission that you committed the offense(s); you can consent to the proceedings and still submit evidence in defense.³²

The new Army pamphlet for enlisted personnel, *Legal Guide for the Soldier*, also points out to the serviceman that, in an Article 15 proceeding, he may submit defensive evidence even if he waives court-martial.³³ The serviceman's election thus is clearly not a guilty plea.

The Note asserts that in practice, however, commanders disregard the rule:

The . . . argument—that accepting an Article 15 does not necessarily lead to conviction and punishment—is simply at war with reality. It is, of course, theoretically possible for a commander to decline to impose punishment, but in practice this possibility is virtually nil.³⁴

This assertion lacks empirical foundation. Of course, the indisputable fact is that, in the vast majority of cases in which a commander initiates an Article 15 proceeding, he ultimately imposes punishment. But it is a non sequitur to conclude on the basis of this fact that electing Article 15 is equivalent to a guilty plea. The high conviction rate in federal district courts does not prove that federal judges and juries are incapable of giving defense evidence serious

29. *Id.* at 1484-85.

30. MCM, *supra* note 5, ¶ 133a.

31. Army Reg. No. 27-10, ¶ 3-13a (Sept. 7, 1971).

32. Army Reg. No. 27-10, App. E (to be published in January 1974).

33. Army Pam. No. 27-14, ¶ 5-1.2d (Mar. 30, 1973).

34. Yale Note, *supra* note 1, at 1486.

The Unconstitutional Burden of Article 15: A Rebuttal

consideration.³⁵ The conclusion is nothing more than *ipse dixit* and as such is insufficient to show that the opportunity to demonstrate innocence afforded in an Article 15 proceeding is sham.

Even if it is conceded *arguendo* that an Article 15 election is tantamount to a guilty plea, the procedure would still pass constitutional muster. The Note contends that under *Jackson* a defendant may not be required to face the prospect of more serious punishment if he pleads innocent rather than guilty since his Fifth Amendment right not to plead guilty will thereby be burdened.³⁶ In 1970, the Supreme Court explicitly rejected this interpretation of *Jackson*. In *Brady v. United States*,³⁷ the petitioner had changed his plea from not guilty to guilty, allegedly to avoid the possibility of a death penalty which could have been imposed after a jury trial and guilty verdict.³⁸ Brady subsequently contended that the prospect of a death penalty had unconstitutionally coerced his guilty plea.³⁹ Writing for the majority, Justice White held that a guilty plea was not

compelled and invalid under the Fifth Amendment whenever motivated by the defendant's desire to accept the certainty or probability of a lesser penalty rather than face a wider range of possibilities extending from acquittal to conviction and a higher penalty authorized by law for the crime charged.⁴⁰

The opinion emphasized that the critical inquiry in evaluating the constitutionality of a guilty plea was whether it was voluntarily tendered.⁴¹ Subsequent decisions have continued to emphasize the voluntariness issue⁴² and have reaffirmed the conclusion in *Brady* that a guilty plea is not invalid under *Jackson* simply because it is induced

35. See Moyer, *Procedural Rights of the Military Accused: Advantages Over a Civilian Defendant*, 51 MIL. L. REV. 1, 37 n.253 (1971).

36. See Yale Note, *supra* note 1, at 1484-86. This interpretation of *Jackson* has been discussed by several commentators. See, e.g., Poe, *Capital Punishment Statutes in the Wake of United States v. Jackson: Some Unresolved Questions*, 37 GEO. WASH. L. REV. 719, 739 (1969); Comment, *United States v. Jackson: Guilty Pleas and Replacement Capital Punishment Provisions*, 54 CORNELL L. REV. 448, 450 (1969); 35 BROOKLYN L. REV. 122, 128 (1968).

37. 397 U.S. 742 (1970).

38. *Id.* at 743-44, 746, 749-50.

39. *Id.* at 744, 746.

40. *Id.* at 751.

41. *Id.* at 750-55.

42. See, e.g., *Santobello v. New York*, 404 U.S. 257, 261-62 (1971) ("The [guilty] plea must, of course, be voluntary and knowing and if it was induced by promises, the essence of those promises must in some way be made known."); *North Carolina v. Alford*, 400 U.S. 25, 31 (1970) ("The standard [for determining the validity of a guilty plea] was and remains whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant.").

by the possibility that more serious punishment might result from a plea of not guilty.⁴³

The Yale Note omits any discussion of *Brady* and later cases.⁴⁴ Clearly these cases lead to the conclusion that the Article 15 election procedure is constitutional, even assuming *arguendo* that an election amounts to a guilty plea. By so "pleading guilty," a service member avoids the possibility that he will receive the more severe punishment which might result if he "pleads not guilty," *i.e.*, refuses to elect an Article 15 proceeding and insists instead on a special court. While in individual cases a commander's misconduct or failure to provide proper advice might render the "plea" nonvoluntary, the prescribed Article 15 procedures would, if adhered to, enable the service member to make a voluntary, informed choice, as required by *Brady* and subsequent decisions.⁴⁵

2. Waiver of the Sixth Amendment Right to Jury Trial

The Note's Sixth Amendment argument poses four questions: (1) Does the *Jackson* rationale apply to the waiver of nonconstitutional

43. See, e.g., *North Carolina v. Alford*, 400 U.S. 25, 31 (1970).

44. The Note does cite one post-*Brady* "plea bargain" case, *North Carolina v. Alford*. Yale Note, *supra* note 1, at 1486 n.40. However, the Note cited *Alford* only to support the proposition that a waiver of the right to trial constituted the "essence of a guilty plea." *Id.* at 1486. The Note failed to discuss the main holding in *Alford*—that a guilty plea tendered in order to avoid a death penalty is valid under *Brady* even though accompanied by protestations of innocence. See 400 U.S. at 31-39. "An individual accused of crime may voluntarily, knowingly, and understandingly consent to the imposition of a prison sentence even if he is unwilling or unable to admit his participation in the acts constituting the crime." *Id.* at 37.

45. The procedures accompanying initiation of an Article 15 proceeding seem sufficient to enable the serviceman to make a voluntary "guilty plea" election under the *Brady* standards. See note 42 *supra*. The commander begins an Article 15 proceeding by notifying the serviceman. MCM, *supra* note 5, ¶ 133a, Army Reg. No. 27-10, ¶ 3-14a (Sept. 7, 1971). The notification has several elements. First, the commander informs the serviceman that he has received a report that the serviceman has violated the Uniform Code. MCM ¶ 133a, Army Reg. No. 27-10, ¶ 3-14a (Sept. 7, 1971). Second, the commander informs the serviceman of his rights under Article 31(b) of the Code; that is, the commander apprises the individual that he has the right to remain silent and that anything he says can be used against him in a court-martial trial. MCM ¶ 133a, Army Reg. No. 27-10, ¶ 3-14a (Sept. 7, 1971). See 10 U.S.C. § 831(b) (1970). Third, the commander tells the serviceman that he may consult legally qualified counsel concerning the proposed disciplinary action. Army Reg. No. 27-10, ¶ 3-12a (Sept. 7, 1971). The commander must inform the serviceman of the location of counsel whom he may consult. *Id.* The counsel must be a judge advocate officer, a Department of the Army civilian attorney, or an officer admitted to the bar of a federal court or the highest court of a state. *Id.* Fourth, the commander informs the serviceman that he is considering imposing nonjudicial punishment for the offense. MCM ¶ 133a, Army Reg. No. 27-10, ¶ 3-12a (Sept. 7, 1971). Upon request, the commander must apprise the serviceman of the maximum authorized punishment for the offense in an Article 15 proceeding and in a court-martial. Army Reg. No. 27-10, ¶ 3-12b (Sept. 7, 1971). Fifth, the commander tells the serviceman that he may demand court-martial in lieu of the Article 15 proceeding. MCM ¶¶ 132-33a, Army Reg. No. 27-10, ¶ 3-12a (Sept. 7, 1971). Sixth, the commander informs the serviceman that he may demand an informal hearing at which the serviceman may call witnesses and be represented by a spokesman. Dep't of the Army Military Justice Message No. 11,618, Subject: Interim Change to Army Reg. No. 27-10 (March 16, 1973).

The Unconstitutional Burden of Article 15: A Rebuttal

rights? (2) If not, does the serviceman nevertheless waive a Sixth Amendment right to jury trial when he waives court-martial? (3) Assuming that the serviceman waives a constitutional right, what standard must the Government meet to justify the waiver procedure? and (4) Can the Government meet the governing standard?

With respect to the first issue the Note argues that *Jackson* applies to the waiver of nonconstitutional rights, stating that "even statutory rights once granted must be implemented in a constitutional manner."⁴⁶ As authority for *Jackson's* extension to statutory rights, the Note cites *Carter v. Jury Commission*.⁴⁷ *Carter* is inapposite. In that case state officials had discriminated against blacks in the selection of grand jurors. Several black residents challenged the discrimination as a denial of equal protection. The defendants invoked the right-privilege distinction; they argued that the black residents' complaint did not state a constitutional claim because grand jury service is a privilege.⁴⁸ The Supreme Court properly rejected the argument. In *Carter*, the claim had patently constitutional dimensions. The discrimination itself violated the letter of the equal protection clause.

The intended meaning of the assertion that "even statutory rights once granted must be implemented in a constitutional manner" is somewhat difficult to elucidate. If the statement means that statutory rights must be implemented in accordance with independently applicable constitutional standards, then it is of course unassailable and *Carter* is apposite. In this case, however, the statement does not address the question of whether the Article 15 waiver procedure is invalid under *Jackson* if there are no "independent" grounds for unconstitutionality such as an equal protection violation. If the statement means that, while a serviceman has no Sixth Amendment right to jury trial, the statutory provision of a procedure comparable to a jury trial must comport with Sixth Amendment standards, then it is without support in constitutional law.

The analysis in the Note thus fails to advance the thesis that *Jackson* applies to waivers of nonconstitutional rights. The applicable case law is certainly of no assistance. On its face, Justice Stewart's opinion in *Jackson* does not extend the doctrine to waivers of nonconstitutional rights. Whenever Justice Stewart referred to the waiver in question, he specifically described it as a surrender

46. Yale Note, *supra* note 1, at 1487.

47. 396 U.S. 320 (1970).

48. *Id.* at 330.

of constitutional rights.⁴⁹ This practice is certainly some evidence that he intended to limit *Jackson* to waivers of constitutional rights. The lower courts which have addressed the question have restricted *Jackson* to waivers of constitutional rights. The Court of Appeals for the Tenth Circuit has expressly found that *Jackson* was concerned with a "burden on the exercise of a constitutional right."⁵⁰ In *Wool-lard v. United States*,⁵¹ the Court of Appeals for the Fifth Circuit refused to apply the *Jackson* doctrine to a statute which did "not interfere with any constitutional right"⁵² The Nevada Supreme Court reached the same conclusion in *Goldstein v. Pawlikowski*.⁵³ The Note has thus given *Carter* an excessively broad reading which has no support in the case law.

We must now reach the second question: By waiving his right to special court, does the serviceman waive a Sixth Amendment right to jury trial? The Note asserted that the court-martial panel is the "functional equivalent" of a civilian jury.⁵⁴ This assertion scarcely supports the proposition that the Sixth Amendment right to jury trial subsumes the statutory right to special court-martial trial. For two reasons, the question must be answered in the negative.

First, the Supreme Court has held that the Sixth Amendment right to jury trial does not apply where the serviceman has committed an offense triable by court-martial.⁵⁵ The Warren Court approvingly cited the rule in 1969⁵⁶ and the Burger Court recently reiterated it.⁵⁷

The Article 15 waiver procedure thus presents much the same issue as confronted lower courts which were asked to evaluate the validity of jury trial waivers in juvenile court proceedings in the aftermath of *McKeiver v. Pennsylvania*.⁵⁸ Many jurisdictions require

49. See, e.g., 390 U.S. at 582-83.

50. *Brady v. United States*, 404 F.2d 601, 602 (10th Cir. 1968), *aff'd*, 397 U.S. 742 (1970); *Segura v. Patterson*, 402 F.2d 249, 253 (10th Cir. 1968), *rev'd on other grounds*, 403 U.S. 946 (1971).

51. 416 F.2d 50 (5th Cir. 1968).

52. *Id.* at 51.

53. 87 Nev. 512, 489 P.2d 1159 (1971).

54. Yale Note, *supra* note 1, at 1487.

55. See *Whelchel v. McDonald*, 340 U.S. 122, 127 (1950): "Petitioner can gain no support from the analogy of trial by jury in the civil courts. The right to trial by jury guaranteed by the Sixth Amendment is not applicable to trials by courts-martial or military commissions."

56. *O'Callahan v. Parker*, 395 U.S. 258, 261 (1969) (emphasis in original):

[T]he exigencies of military discipline require the existence of a special system of military courts in which not all of the specific procedural protections deemed essential in Art. III trials need apply. The Fifth Amendment specifically exempts "cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger" from the requirement of prosecution by indictment and, inferentially, from the right to trial by jury.

57. *Gosa v. Mayden*, 93 S. Ct. 2926 (1973).

58. 403 U.S. 528 (1971).

The Unconstitutional Burden of Article 15: A Rebuttal

that youthful offenders waive jury trial as a condition precedent to trial in juvenile court.⁵⁹ Several courts had taken the position that *Jackson* invalidated the waiver procedure.⁶⁰ However, the trend in the decisional law changed radically after the Supreme Court's decision in *McKeiver*, which held that jury trials need not be provided in juvenile court proceedings.⁶¹

In his majority opinion, Justice Blackmun emphasized that:

There is a possibility at least that the jury trial, if required, will remake the juvenile proceeding into a fully adversary process and will put an effective end to what has been the idealistic prospect of an intimate, informal protective proceeding.⁶²

Influenced by *McKeiver*, the prevailing view is now that *Jackson* does not invalidate the jury trial waiver in juvenile court proceedings. In *Flippo v. State*,⁶³ the Alabama Supreme Court sustained the waiver provision in its state Youthful Offender Act. In *Robinson v. State*,⁶⁴ the Georgia Supreme Court did likewise. The court emphasized that

[t]hat case [*Jackson*] is not analogous to the juvenile's choice between having the charges against him heard in a juvenile court without a jury, or being tried as an adult in the criminal court, with the consequent right of trial by jury.⁶⁵

In *In re Fucini*,⁶⁶ the Illinois Supreme Court adopted the majority view. The Illinois court stressed "the inherent differences between juvenile and criminal proceedings."⁶⁷ The Courts of Appeal for the

59. See, e.g., GA. CODE ANN. § 24-2420 (1970); *Robinson v. State*, 227 Ga. 140, 179 S.E.2d 248 (1971).

60. The leading line of cases arose in New York. See, e.g., *People v. Michael A.C.*, 27 N.Y.2d 79, 261 N.E.2d 620, 313 N.Y.S.2d 695 (1970); *Saunders v. Lupiano*, 30 App. Div. 2d 803, 292 N.Y.S.2d 44 (1968); *People ex rel. Browne v. Kendall*, 62 Misc. 2d 196, 308 N.Y.S.2d 572 (Greene Co. Ct. 1970); *People v. Day*, 61 Misc. 2d 786, 306 N.Y.S.2d 610 (Herkimer Co. Ct. 1969). *Contra*, *People v. Larry K.*, 58 Misc. 2d 526, 296 N.Y.S.2d 404 (Sup. Ct. 1968). The progenitor of these decisions was *United States v. Nieves*, 280 F. Supp. 994 (S.D.N.Y. 1968).

61. 403 U.S. 528, 545 (1971). In reaching this conclusion, Justice Blackmun stressed that, "[O]f all the possible due process rights which could be applied in juvenile courts, the right to trial by jury is the one which would be most likely to be disruptive of the unique nature of the juvenile process." *Id.* at 540. See also *Braxton v. Carlson*, 483 F.2d 933, 941 (3d Cir. 1973): "[T]he transformation of this informal [prison disciplinary] hearing into a formal adversary proceeding with the full panoply of counsel, cross-examination, witnesses, and written record could be self-defeating."

62. 403 U.S. at 545.

63. 269 So. 2d 155 (Ala. 1972).

64. 227 Ga. 140, 179 S.E.2d 248 (1971).

65. *Id.* at 142, 179 S.E.2d at 250.

66. 44 Ill. 2d 305, 255 N.E.2d 380 (1970).

67. *Id.* at 311, 255 N.E.2d at 383.

Sixth,⁶⁸ Eighth,⁶⁹ and Ninth Circuits⁷⁰ have all adopted the view that the jury trial waiver in juvenile court proceedings is constitutional.

The Article 15 waiver procedure and the jury trial waiver in juvenile court proceedings serve similar governmental policies. The two principal advantages of a juvenile court proceeding are that the juvenile court's focus is corrective and that the proceeding shields the youth from an adult conviction.⁷¹ The Article 15 procedure has equivalent advantages. More to the point, both waiver procedures are constitutional since neither involves the surrender of a Sixth Amendment right.

Second, even if the federal courts would reverse long-established precedent and hold that the Sixth Amendment jury trial right applies where the service member has committed an offense triable by court-martial,⁷² the Article 15 election feature would meet prevailing constitutional standards. In *Duncan v. Louisiana*,⁷³ the Supreme Court held that the Fourteenth Amendment's due process clause incorporates the Sixth Amendment right to jury trial. However, the Court carefully pointed out that it was not holding that the right applied to all types of trials. The Court upheld the common law rule that the right does not apply to petty offense trials.⁷⁴ Although the Court did not draw a precise line between petty and serious offenses,⁷⁵ Justice White's opinion indicates that an offense punishable by no more than six months' confinement may be considered petty.⁷⁶ The maximum punishment which a special court can impose is six months' confinement at hard labor.⁷⁷ Hence, even if there were a right to jury trial in connection with court-martial offenses, the right would not reach the special court-martial, which is a "petty offense" tribunal.

Once more, the jury trial issue can be resolved in favor of the

68. *United States v. King*, 482 F.2d 454 (6th Cir. 1973).

69. *Cotton v. United States*, 446 F.2d 107 (8th Cir. 1971).

70. *United States v. Salcido-Medina*, 483 F.2d 162 (9th Cir. 1973); *United States v. James*, 464 F.2d 1228 (9th Cir. 1972), *cert. denied*, 409 U.S. 1086 (1973).

71. *See, e.g., McKeiver v. Pennsylvania*, 403 U.S. 528, 545 (1971).

72. The trend of current decisions does not appear to be in this direction. In *Daigle v. Warner*, 42 U.S.L.W. 2269 (9th Cir. Oct. 24, 1973), the Ninth Circuit refused to extend the Sixth Amendment requirement of appointed counsel for indigents to the summary court-martial context. The holding was based on a determination that the Amendment does not cover court-martial proceedings. This decision reversed a district court holding relied on in the Note. *See Yale Note, supra* note 1, at 1491.

73. 391 U.S. 145 (1968).

74. *Id.* at 160.

75. *Id.* at 159-62.

76. *Id.* at 159.

77. 10 U.S.C. § 819 (1970).

The Unconstitutional Burden of Article 15: A Rebuttal

constitutionality of Article 15. But even if it is assumed, in the teeth of *Duncan*, that a hypothetical jury trial right would apply to special courts, the waiver procedure would be constitutional.

If the Article 15 waiver procedure involved the surrender of a Sixth Amendment right to jury trial, the question would remain what test determines whether the waiver procedure satisfies *Jackson*. The *Jackson* Court did not hold that any procedure encouraging the waiver of a constitutional right is itself unconstitutional. On the contrary, it stated that "Congress' objectives . . . cannot be pursued by means that *needlessly* chill the exercise of basic constitutional rights."⁷⁸ This statement implies that, at least under some circumstances, a provision allowing waiver of the jury trial right would be constitutional.⁷⁹ The lower courts have differed in determining the standard which the Government must meet to satisfy *Jackson*. Some courts hold that if *Jackson* applies the Government need show only a rational relationship between the waiver procedure and a legitimate policy;⁸⁰ others hold that the Government must prove a necessary relationship to a legitimate policy.⁸¹ In a dissenting opinion, Justice Brennan suggested that the Government must demonstrate a necessary relationship to a compelling interest.⁸²

To date, the Supreme Court has not had occasion to resolve this three-way split of authority. However, the second view—that the waiver procedure must bear a necessary relationship to a legitimate government interest—seems most consistent with Justice Stewart's majority opinion in *Jackson*. He recognized there that the Kidnapping Act's penalty clause was rationally related to the legitimate policy of mitigating the death penalty, but demanded a showing of a necessary relationship between the policy and the waiver pro-

78. *United States v. Jackson*, 390 U.S. 570, 582 (1968) (emphasis added).

79. See, e.g., *Scott v. United States*, 419 F.2d 264, 270 (D.C. Cir. 1969) ("[T]he majority [in *Jackson*] did not rely upon the summary argument that the exercise of such a [constitutional] right could in no way be made costly. The Court rather asked 'whether that effect is unnecessary and therefore excessive.'"); *Martin v. Superior Court*, 17 Cal. App. 3d 412, 417, 95 Cal. Rptr. 110, 112-13 (1971) (emphasis in original):

We note that . . . *Jackson* [does not] hold that a statute which might in any conceivable or questionable way touch upon the exercise of a constitutional right is for that reason invalid. Indeed, as indicated, the Court in *Jackson* was careful to point out that it was holding void only such statutes . . . "that *needlessly* chill the exercise of basic constitutional rights . . ."

80. See, e.g., *Commonwealth v. Littlejohn*, 433 Pa. 336, 343, 250 A.2d 811, 814 (1969) (The challenged procedure must "advance a legitimate 'purpose or effect.'").

81. See, e.g., *Martin v. Superior Court*, 17 Cal. App. 3d 412, 417, 95 Cal. Rptr. 110, 113 (1971) (The procedure must be "reasonably required for reasons of policy or convenience.").

82. See *Oregon v. Mitchell*, 400 U.S. 112, 238 (1970) (Brennan, White & Marshall, JJ., dissenting).

cedure.⁸³ There is not a single sentence in the opinion which suggests that the procedure must be necessarily related to a *compelling* state interest. The Supreme Court is well aware of the distinction between compelling and merely legitimate government policies.⁸⁴ If Justice Stewart had intended the constitutional standard to be the former, he undoubtedly would have so specified.

Assuming, then, that the controlling test for waivers of constitutional rights is a necessary relationship to a legitimate state interest, the Article 15 procedure would seem to be constitutional. This conclusion gains at least tangential support from two categories of cases sustaining the constitutionality of procedures roughly analogous to the Article 15 waiver. Furthermore, it seems consistent with an analysis of the governmental interests served by Article 15.

The first category of cases involves civil service disciplinary proceedings. In *Coleman v. Ginsberg*,⁸⁵ a civil service employee's superior recommended that he be disciplined by a fine. Under New York law the employee could either accept the fine or demand a full hearing at which he could receive more serious disciplinary punishments, including dismissal, suspension, or demotion. The employee argued that *Jackson* invalidated the waiver procedure. The court rejected the argument:

[T]he matter of disciplining employees cannot possibly be analogized to a kidnapping charge carrying a possible death penalty, nor a statutory provision for a hearing before a hearing officer to the constitutional right to a jury trial.⁸⁶

The second category of cases involves instances in which a trial de novo is available after a summary bench trial. In several states the prosecutor initially tries criminal cases in a court of limited jurisdiction by summary bench procedure. If convicted, the defendant can appeal to the court of general jurisdiction, where he is entitled to trial de novo but where he may receive a more severe sentence.⁸⁷ Lower courts had divided on the constitutionality of this procedure.⁸⁸ However, in *Colten v. Kentucky*,⁸⁹ the Supreme Court sustained

83. See *United States v. Jackson*, 390 U.S. 570, 581-83 (1968).

84. See, e.g., *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1 (1973).

85. 66 Misc. 2d 46, 319 N.Y.S.2d 338 (Sup. Ct. 1971).

86. *Id.* at 49, 319 N.Y.S.2d at 341.

87. See, e.g., *State v. Keegan*, 296 A.2d 483 (Maine 1972); ME. DIST. CRT. R. 37(a), 38, 39(b), 40.

88. See cases cited in *Mann v. Commonwealth*, 271 N.E.2d 331, 335 nn.5-6 (Mass. 1971).

89. 407 U.S. 104 (1972).

The Unconstitutional Burden of Article 15: A Rebuttal

the procedure, noting that “the inferior courts are not designed or equipped to conduct error-free trials, or to insure full recognition of constitutional freedoms. They are courts of convenience”⁹⁰ Significantly, the Court stressed the weight of the state’s interest in “conveni[ent], . . . speedy, and inexpensive means of disposition of charges of minor offenses”⁹¹ The Kentucky trial de novo procedure placed the defendant in a difficult position. Under the Kentucky procedure his only options were to accept the inferior court’s sentence or to appeal, receive a trial de novo, and thereby run the risk that the court of general jurisdiction would impose a more severe sentence. The analogy to the Article 15 context is immediately apparent. If the Kentucky procedure is not constitutionally infirm, it is difficult to believe that the Supreme Court would invalidate the Article 15 waiver procedure.

An analysis of the governmental interests furthered by Article 15 provides further support for this conclusion. The governing Army regulation states that the three purposes of Article 15 are to:

- (1) Correct, educate, and reform offenders who have shown that they cannot benefit by less stringent measures;
- (2) Preserve, in appropriate cases, an offender’s record of service from unnecessary stigmatization by record of court-martial conviction; and
- (3) Further military efficiency by disposing of minor offenses in a manner requiring less time and personnel than trial by court-martial.⁹²

a. *Military Discipline*

The first objective—which may be characterized as the military discipline interest—is far different from the governmental interest which was at stake in *Jackson*. In *Jackson*, aside from minor considerations of economy and convenience, it was a matter of complete indifference to the Government whether Jackson was tried by judge or jury. The judge has no special or unique responsibility for the maintenance of law and order in the civilian community; that community can maintain its peace and order as long as someone, judge or jury, acts on the offenses. Unlike the civilian judge, the military commander is responsible for the discipline of the persons subject to his punitive jurisdiction. The state of his unit’s discipline deter-

90. *Id.* at 117.

91. *Id.*

92. Army Reg. No. 27-10, ¶ 3-4a (Sept. 7, 1971).

mines the unit's overall ability to achieve its mission. In a combat situation the state of the unit's discipline might determine whether the unit's members live or die. The commander's Article 15 powers, his only personal, punitive powers,⁹³ greatly enhance his ability to maintain discipline within his unit. There are undoubtedly those who would scoff that such an intangible governmental interest cannot be substantial. However, it must be remembered that in the final analysis a soldier's discipline consists of psychological conditioning to immediately obey any order which is not patently illegal.⁹⁴ The commander is responsible for that conditioning and it is he who will ultimately issue the order which might mean survival for the unit. If the governmental interest in strong military leadership is "legitimate,"⁹⁵ then the Article 15 procedure is "necessary," since personal punitive power is essential to effective command.

b. *Harm to the Service Member*

Two other governmental interests are served by the Article 15 procedure—minimization of harm to the serviceman and maintenance of judicial efficiency. As in the case of the military discipline interest, the Article 15 procedure seems "necessary" if these goals are to be adequately served. This point is best made by considering a set of "less drastic" alternatives which the Note proposed as solutions to the "unconstitutional" burden of Article 15. The three proposals were to: (1) abolish Article 15 proceedings, (2) afford the serviceman the full panoply of judicial safeguards in Article 15 proceedings, or (3) maintain the waiver procedure but limit the sentence of any subsequent court-martial to the punishments which the commander could have initially imposed in an Article 15 proceeding.⁹⁶

93. His other powers are either administrative, nonpunitive powers, *e.g.*, to suspend privileges or to recommend that other agencies take punitive action.

94. *United States v. Calley*, 46 C.M.R. 1131 (ACMR 1973); *BRITISH MANUAL OF MILITARY LAW* ¶ 433 (1958); L. OPPENHEIM-LAUTERPACHT, II *INTERNATIONAL LAW* § 253 (8th ed. 1955); W. WINTHROP, *MILITARY LAW AND PRECEDENTS* 296 (2d ed. 1896).

95. The Note does not question the legitimacy of this state interest. *See Yale Note, supra* note 1, at 1489. *See generally* 119 CONG. REC. S. 3137-38 (daily ed. Feb. 22, 1973) (remarks of Senator Bayh on S. 987); *Relford v. Commandant*, 401 U.S. 355, 363 (1970); *Reid v. Covert*, 354 U.S. 1, 36 (1957); *Burns v. Wilson*, 346 U.S. 137, 140 (1953).

The Note authors suggest that non-Article 15 administrative action might adequately serve the military discipline interest. *See Yale Note* 1492 ("a commander would still have authority [in the absence of Article 15] to remove discretionary privileges, recommend against promotion or other favorable personnel action, and issue reprimands . . ."). These alternative means, however, would be far from adequate. *See Hearings on H.R. 7656 Before Subcomm. No. 1 of the House Comm. on Armed Services*, 87th Cong., 1st Sess. 4903 (1962).

96. *Yale Note* 1491.

The Unconstitutional Burden of Article 15: A Rebuttal

In the long run all three alternatives would work to the detriment of servicemen. From the serviceman's point of view the first alternative is unacceptable. The abolition of Article 15 would virtually ensure a dramatic rise in the number of minor offenses tried by courts-martial. A much higher percentage of minor offenders would thus receive federal convictions⁹⁷ and possibly punitive discharges.⁹⁸

The typical serviceman would find the ultimate consequences of the second alternative almost as unappealing. The predominant sentiment among commanders is that Article 15 procedures have already become overly complex and time-consuming.⁹⁹ One of the primary reasons commanders employ Article 15 is that they can use such proceedings conveniently; the procedures are informal and swift. Although they are burdened with administrative responsibilities, commanders can find the time to conduct summary hearings. It is highly doubtful, however, that they could find the time to conduct full-blown trial hearings. If Article 15 proceedings are judicialized, commanders will probably prefer court-martial charges in a higher percentage of cases.

While the third alternative is the most acceptable, it too has deficiencies. Limiting the sentencing power of the subsequent court-martial to the level initially chosen by the commander would tend to encourage the commander to oblige any serviceman who demands court-martial. At the present time the commander has a practical incentive for deciding against preferring court-martial charges for a trivial offense. If he imposes Article 15 punishment the serviceman will remain in the unit; the commander will not lose his services.

97. See note 5 *supra*.

98. For a description of punitive discharges, see *THE MILITARY JUDGES' GUIDE*, Army Pam. No. 27-9, ¶ 8-4 (May 19, 1969).

99. *THE COMMITTEE FOR EVALUATION OF THE EFFECTIVENESS OF THE ADMINISTRATION OF MILITARY JUSTICE, REPORT TO GENERAL WILLIAM C. WESTMORELAND* (1971). The Committee found that:

A significant number of junior officers . . . expressed dissatisfaction in varying degrees in . . . nonjudicial punishment. . . . [M]any commanders feel that the provisions of Article 15 of the Uniform Code of Military Justice should be changed to provide for less paperwork—and thus hopefully more prompt punishment—and for an increase in the punishment powers of commanders. Unquestionably, in recent years—and especially since Article 15 was amended in 1963—the imposition of nonjudicial punishment has become increasingly complex, thereby placing a greater burden on an already administratively overburdened commander. . . . [A] continuing effort must . . . be maintained to insure that the paperwork does not become so voluminous and complex that it defeats the purpose of nonjudicial punishment, which essentially is to provide the commander with a simple, expeditious method of disposing of minor offenses without recourse to trial by court-martial.

Id. at 9-10.

If the serviceman is court-martialed, on the other hand, he may be confined or discharged. For this reason a commander with a sense of proportion is reluctant to prefer court-martial charges against a soldier who has committed a technical violation of the Code and rashly demands court-martial. The third alternative would largely remove this reluctance. If the commander knew that the subsequent court's sentencing powers would be limited to the level of Article 15 punishments, he could prefer court-martial charges with no fear of losing the serviceman's services.

This third alternative has a more insidious danger as well. The limitations on the court's punitive powers would apply only when the commander had initially offered Article 15 proceedings and the serviceman had refused the offer. This feature would allow the commander to evade the limitation nearly at will. In many, if not most, instances the commander, familiar with the serviceman in question and the practice within the command, will be able to make an informed assessment of the likelihood that the serviceman will decline the Article 15. Thus, the practical effect of the adoption of the third alternative would be that, when the commander has a serious doubt whether the serviceman will accept an Article 15 and wishes to leave the punitive capacity of a subsequent special court-martial undiminished, he will bypass the Article 15 proceedings and immediately prefer court-martial charges.

The Note evidences awareness of the seriousness of a court-martial conviction. It suggests in connection with the third proposal that any adjudication by a special court-martial demanded by an accused in an Article 15 proceeding be "decriminalized" and eventually expunged from the serviceman's record.¹⁰⁰ It seems unlikely, however, that Congress would be willing to change so radically the character of a court-martial conviction. Certainly no judicial remedy suggests itself as a vehicle for such a "reform." In any case the procedure would not be available where the commander is able to "second guess" the response of the serviceman to the proposed Article 15 proceeding.

In summary, the attack on Article 15 seems dangerously wrong-minded. For the stated purpose of benefiting the serviceman the Article 15 waiver procedure is invalidated, but all of the suggested alternatives to the present procedure would result in an increased number of federal convictions for minor offenders.

100. See Yale Note, *supra* note 1, at 1493.

The Unconstitutional Burden of Article 15: A Rebuttal

c. *Efficiency of the Military Justice System*

The proposals for "reforming" Article 15 proceedings would, by encouraging commanders to prefer court-martial charges in a higher percentage of cases, increase the burden on the military justice system. Such a result seems undesirable. Article 15 is, in effect, an efficient mechanism for pretrial diversion. One has only to consider the state of the civilian criminal system to realize how detrimental the absence of such a mechanism can be.¹⁰¹ Clearly, the primary reason for the civilian courts' dismal performance in providing speedy trials is that the civilian courts have not developed an effective instrument for diversion. The civilian courts are clogged with cases that do not belong in the courtroom.¹⁰²

In sharp contrast, the military has made speedy trial a meaningful guarantee for the serviceman. The Court of Military Appeals has recently announced that it will dismiss charges against an accused who has been in pretrial confinement for more than 90 days unless the Government makes an exacting showing of diligence.¹⁰³ Some military jurisdictions have shortened the time period to 45 days.¹⁰⁴ Needless to say, it will be years before it will be practical for the Supreme Court to impose so salutary a rule on the civilian criminal courts.¹⁰⁵

101. The civilian criminal process is in dire need of an effective plan for pretrial diversion. See THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: THE COURTS 5 (1967). The Commission called for a frank recognition that "[i]t is not in the interest of the community to treat all offenders as hardened criminals." The Commission believed that a large percentage of persons presently prosecuted should be referred "to noncriminal agencies for treatment or for some degree of supervision without criminal conviction." *Id.*

102. See Kadish, *The Crisis of Overcriminalization*, 374 ANNALS 157, 159-62 (1967); Nixon, *Reforming the Administration of Justice*, 57 A.B.A.J. 421 (1971). In a recent report, the National Advisory Commission on Criminal Justice Standards and Goals recommended that traffic violations be disposed of by informal administrative proceedings rather than judicial trials. See Task Force on Courts of the National Advisory Commission on Criminal Justice Standards and Goals, *Recommendations*, 14 CRIM. L. REP. 3014 (1973).

103. *United States v. Burton*, 21 U.S.C.M.A. 112, 44 C.M.R. 166 (1972). In a more recent decision, *United States v. Marshall*, 22 U.S.C.M.A. 431, 435, 47 C.M.R. 409, 413 (1973), the Court of Military Appeals reinforced *Burton*. The court stated that, where *Burton* applies, the Government must show "extraordinary reasons" to rebut the presumption. Elaborating, the court asserted that

the Government must demonstrate that really extraordinary circumstances beyond such normal problems as mistakes in drafting, manpower shortages, illnesses, and leave [vacation] contributed to the delay.

104. The United States Army, Europe, adopted the 45-day rule in USAREUR Supplement 2, Sept. 27, 1971, to Army Reg. No. 27-10.

105. The Second Circuit had promulgated a comparable rule in which the time limit was six months. Second Circuit Rules Regarding Prompt Disposition of Criminal Cases, Rule 4, 28 U.S.C.A. App. (Supp. 1973). Even so moderate a rule proved difficult in its application. See cases cited in *United States v. Scafo*, 480 F.2d 1312, 1313 n.1 (2d Cir. 1973). The set of rules was recently replaced by a "Plan for Achieving Prompt Disposition of Criminal Cases" (App. Feb. 28, 1973; eff. April 1, 1973).

One of the principal reasons that the military is able to process offenses so speedily is the common use of Article 15 to divert minor offenses from the judicial process. The effect of reducing the diversionary capacity of Article 15 would be to make the "speedy trial" guarantee as meaningless for the military defendant as it is for his civilian counterpart. The armed forces' use of Article 15 should offend only those who place undue faith in the judicial process. A society with clogged courtrooms and crowded trial dockets should have learned long ago that the judicial process is not a panacea for America's ills.

The Yale Law Journal

Volume 83, Number 3, January 1974

RANDALL K. C. KAU
Editor-in-Chief

JAMES R. SMOOT
Executive Editor

JAMES N. GARDNER
RUSSELL K. OSGOOD
JOAN G. WEXLER
Article Editors

CARL E. ANDURI, JR.
PETER M. HOFFMAN
RICHARD C. LINQUANTI
SAMUEL T. PERKINS
MARK L. WEISSLER
*Note & Comment
Editors*

WILLIAM J. PERLSTEIN
Managing Editor
REED E. HUNDT
Book Review Editor

NED T. ASHBY
PHILIP C. BOBBITT
JOHN R. BOLTON II
ROY L. BROOKS
DOMINIC J. CAMPISI
JOHN S. GRAHAM III
HENRY B. HANSMANN
STEPHEN T. HOLZER
HOLLY E. KENDIG
MARK I. LEVY
WALLACE D. LOH

ALAN B. LOUGHNAN
OWEN E. MACBRIDE
KATHLEEN P. MARCH
DAVID A. MARTIN
CHARLES MULANEY, JR.
JAN-ANDERS PAULSSON
JOHN H. PETERS
WILLIAM R. PHELPS
JEFFREY E. ROCKWELL
DAVID B. ROE
GERALD ROKOFF

STEWART G. ROSENBLUM
JAN SCHNEIDER
HILARY S. SCHULTZ
ARTHUR J. SILVERSTEIN
GARY J. SIMSON
PETER W. SLY
ROBERT M. SMITH
JOHN C. SUMBERG
TIMOTHY P. TERRELL
FRANK G. WASHINGTON
REEVES C. WESTBROOK

Business Secretaries M. OLIVE BUTTERFIELD, PAMELA WILLMOTT

Student Contributors to This Issue

Philip C. Bobbitt, *Cable Television and Copyright Royalties*

Alan B. Loughnan, *The Need for Reform of Ex-Felon Disenfranchisement Laws*

Holly E. Kendig, *Requests for Information in Class Actions*